

*United States Court of Appeals
for the Second Circuit*



APPENDIX

76-1118

To be argued by
FREDERIC E. WEINBERG

B
PLS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X-----
UNITED STATES OF AMERICA, :

Appellee, :

Bucket No. 76-1118

-against- :

JEROME MACKEY and WILLIAM NELSON, :

Defendants-Appellants. :

X-----

APPENDIX FOR APPELLANT

JEROME MACKEY

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FREDERIC E. WEINBERG, ESQ.
515 Madison Avenue
New York, New York 10022
(212) PL2-1720



PAGINATION AS IN ORIGINAL COPY



Form No. 100

CRIMINAL DOCKET

75-10
75CR 468

WEINSTEIN, J.

75-852

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.: H. FRIEDMAN

vs.
JEROME MACKEY, RICHARD E. TAYLOR
& WILLIAM NELSON

MACKEY - M. Wolf 1 Old

Country Road- Carle Place

N.Y. (516) 248-0600

deft. NELSON: (court app'td)

David McCarthy

1527 Franklin Ave

Mineola, NY 11501

516-746-1616

For Defendant: TAYLOR

Charles D. Holmes

2003 E. 15th Street Tulsa

Oklahoma- (918) 932-4242

Court app'td counsel: Nelson

LEGAL AID

David W. McCarthy

Did devise a scheme to defraud prospective stereo

tape distributors & to obtain money by means of
false pretenses

AMOUNT

CASH RECEIVED AND DISBURSED

	DATE	NAME	RECEIVED	DISBURSED
Fine,	2-26-76	Notice of Fine Mackey	5	
Clerk,	2-27-76	Bail - Taylor	5	-
Marshal,	2-28-76	Notice of Bail - Nelson		
Attorney,				
Commissioner's Court,				
Witnesses,				

UNITED STATES COURT OF APPEALS
FILED
MAR 17 1976
DANIEL FUSARO, CLERK
SECOND CIRCUIT

DATE	PROCEEDINGS
1-6-5-75	Before JUDD, J- Indictment filed
6/23/75	Before WEINSTEIN, J.- Case called- Defts Mackey and Taylor present with counsel-Mr. Holmes admits for purpose of this case- Deft Nelson presen Legal Aid assigned as counsel for deft Nelson- All defts arraigned and each enter pleas of not guilty- pretrial conference held and concluded- all defts O.R.- bail limits to Continental U.S. for all defts-Trial set for 9/29/75 at 9:30 A.M.-All documents to be marked 9/26/75 at 10:00 A.M.
6/23/75	Notices of appearances filed(2) MAKCEY, and TAYLOR)
6-23-75	Govts Notice of Readiness for Trial filed.
6-26-75	By WEINSTEIN J - Order appointing counsel filed for deft NELSON
9/17/75	Before WEINSTEIN, J.- Case called- Motion by deft Mackey for adjournment

75CR 468

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
6/9-22-75	Stenographers transcript filed dated 9-17-75		
7/9-24-75	Mailogram filed received from Chambers indicating that trial scheduled to begin on Sept. 29, 1975.		
7/29/75	Letter ^{from} to _{deft} Nelson _{from} Judge Weinstein dated 9/22/75 filed re:request for new counsel		
7/29/75	Telegraphic Message from Judge Weinstein to deft Nelson filed re:that deft is required to appear on 9/24/75 etc.		
7/29/75	Before WEINSTEIN, J. - Case called- Deft Nelson and counsel present - David McCarthy substituted in place of Legal Aid as counsel for deft Nelson - bail limits extended to S.D.N.Y. and E.D.N.Y.		
7/29/75	Before WEINSTEIN J - case called - deft TAYLOR & atty present - On motion of AUSA Friedman the Indictment is dismissed as to deft TAYLOR without prejudice.		
7/29/75	By WEINSTEIN J - Order of dismiss al filed (TAYLOR)		
7/29/75	Before WEINSTEIN J - case called - defts & attys present - application for adjournment of trial by deft NELSON is denied - An investigator is appointed for deft NELSON & dail copy for deft NELSON in forma pauperis is granted - submit Order - motion by deft NELSON to dismiss counts 16 through 21 is denied - so ordered - Govts Ex. 1 through 37 marked for ident. Trial set for 9-29-75 at 10:00 am,		
7/29/75	By WEINSTEIN J - Order appointing counsel fil: i for deft Nelson.		
7/29/75	Before WEINSTEIN, J. - Case called- Defts and counsel present- Trial ordered and begun- Defts motion to dismiss-deft Nelson's motion for adjournment of trial for 2 days denied- defts motion that all grand jury minutes be turned over at this time denied-motion by deft Mackey for severance denied-juror selected and sworn-Govt's motion to dismiss count 13 granted-Trial continued to 9/30/75 at 9:45 A.M.		
7/30/75	Before WEINSTEIN, J. - Case called- Defts and counsel present- Trial resumed trial contd to 10/1/75 at 10:00 A.M.		
10-1-75	Before WEINSTEIN J - case called - defts & attys present - trial resumed - trial contd to Oct. 2, 1975 at 10:00 am.		
10-2-75	Before WEINSTEIN J - case called - defts & attys present - trial resumed - trial contd to Oct. 3, 1975.		
10-3-75	Before WEINSTEIN J - case called - defts & attys present trial resumed - trial contd to Oct. 6, 1975 @ 9:30 am.		
10-6-75	Before WEINSTEIN J - case called - defts & attys present - trial resumed - trial contd to Oct. 7, 1975		

DATE	PROCEEDINGS
10-7-75	Before WEINSTEIN J - case called - defts & attys present - trial resumed - Govt rests - motion by defts individually to dismiss the indictment - denied - defts motion to dismiss counts 16 thru 21 is denied; defts motion to dismiss the indictment because of the attorney, client privilege is denied - trial contd to Oct. 8, 1975 at 2:30 PM.
10-8-75	Before WEINSTEIN J - case called - defts Mackey & Nelson present - trial resumed - trial contd to 10-9-75.
10-9-75	Stenographers transcript filed dated 9-26-75
10/10/75	By WEINSTEIN, J. - Order of sustenance dated 10/9/75 filed
10/9/75	Before WEINSTEIN, J. - Case called - Defts and counsel present - Trial resumed - Court charges jury - jury retires to deliberate - trial contd to 10/10/75 at 9:00 A.M.
10/10/75	Before WEINSTEIN, J. - Case called - Defts and counsel present - trial resumed - jury resumes deliberations - trial contd to 10/14/75 at 9:30 A.M.
10/10/75	By WEINSTEIN, J. - Two (2) orders of sustenance filed
10/14/75	By WEINSTEIN, J. - Two (2) orders of sustenance filed
10-14-75	Before WEINSTEIN J - case called - defts Mackey & Nelson present with counsels - trial resumed - Jury resumes deliberations at 9:40 am - Order of sustenance signed for Lunch - Verdict retd at 6:40 PM - as to deft Mackey, not guilty counts 1 thru 8 and 16 to 21; guilty on counts 9 to 15 incl.; as to deft Nelson not guilty counts 16 thru 21 and guilty counts 1 to 15 incl. sentences adjd without date - Jury polled - Jury dismissed - trial concluded - motions will be made at time of sentence - briefs to be submitted - bail contd as to each deft.
10-14-75	9 volumes of stenographers transcript filed (pgs 1 to 1421)
10-17-75	Voucher for Expert Services filed (Wm. Nelson)
10/20/75	Letter from David McCarthy dated 10/17/75 filed re:request for transcription of certain proceedings - rest of
10/20/75	By WEINSTEIN, J. - Order filed that transcript shall be prepared - (order bottom of above letter)
10/29/75	Letter from David Trager dated 10/28/75 filed
11-10-75	Letter of Nov. 5, 1975 filed received from Chambers from counsel Marvin Wolf re deft Jerome Mackey - adjournment to Jan. 5, 1976 granted - Clerk to inform probation - So Ordered by Judge Weinstein.

DATE	PROCEEDINGS
11/14/75	By WEINSTEIN, J. - Memorandum and Order filed denying motion to dismiss indictment
11-17-75	Letter filed from Marvin Wolf, Esq. counsel for deft Jerome Mackey (re withdrawal of fact-finding hearing etc)
11/19/75	Letter from David McCarthy requesting adjournment of sentence for deft Nelson- adjournment to 1/15/76 granted(order on bottom of letter)
11/28/75	Letter from Marvin Wolf dated 11/24/75 filed re:permission for deft MACKEY to travel to N.J. and Penn.- Permission granted by Judge Weinstein(order on bottom letter)
12-5-75	4 Stenographers transcripts filed (one dated Oct. 3, one dated Oct. 9, one dated Oct. 10 and one dated Oct. 14, 1975)
12-8-75	Voucher for expert services filed (Nelson)
12/10/75	Voucher for expert services filed
1-6-76	Notice of Motion filed, ret. Jan. 16, 1976= for judgment of acquittal setting aside the verdict of guilty on for a new trial, etc. (deft Jerome Mackey) & Memorandum in support of motion filed.
1-6-76	Notice of Motion filed, ret. Jan. 16, 1976, for an order dismissing the Indictment, directing a new trial etc.(deft Nelson) & Memorandum of Law filed in support of motion etc.
1-14-76	Letter filed dated Jan. 13, 1976 from counsel for deft William Nelson David McCarthy, Esq. that sentencing has been adjd to 2-20-76 at 10:30 am . So ordered by Judge Weinstein (see notation on letter)
1-16-76	Before WEINSTEIN J - case called - adjd to 2-20-76 as to sentences for defts Nelson & Mackey. ; motion for Judgment of Acquittal and to set aside verdict adjd to 2-20-76.
2-2-76	Letter filed from Jesse Zaslow, Esq. dated 1-27-76 received from Chamber
2-9-76	Copy of letter from Douglas J. Kramer dtd 2-4-76 re statements filed.
2-20-76	Before WEINSTEIN J - case called - deft NELSON & counsel D.McCarthy present. Defts REPRESENTED to set aside the verdict is denied. Deft sentenced to 5 years imprisonment pursuant to 18:3651 on each of counts 1 thru 15 incl., to run concurrently. Deft to serve 6 months and execution of remainder of sentence is suspended and the deft is placed on probation for 4½ years. Stay of execution of sentence is granted pending appeal. Deft MACKEY & counsel Marvin Wolf present - defts motion to set aside the verdict is denied - deft sentenced to 5 years imprisonment pursuant to 18:3651 on each of counts 9, 10, 11, 12, 13, 14 & 15 to run concurrently. Deft to serve 6 months and execution of remainder of sentence is suspended and the deft is placed on probation for a period of 4½ years. Stay

D. C. 109

RED:HJF:mt
F.#741,964

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
JUN 5 1975

----- X -----
UNITED STATES OF AMERICA

TIME A.M.
P.M.

- against -

Cr. No. _____
(T. 18, U.S.C., §1341 and §2)

JEROME MACKEY, RICHARD E. TAYLOR
and WILLIAM NELSON,

Defendants.

----- x 75CR 468

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FIFTEEN

1. At all times material herein, the defendant JEROME MACKEY was President of Mackey Distributors, Inc.
2. At all times material herein, the defendant RICHARD E. TAYLOR was Vice President of Mackey Distributors, Inc.
3. At all times material herein, the defendant WILLIAM NELSON was Secretary-Treasurer of Mackey Distributors, Inc.
4. At all times material herein, Mackey Distributors, Inc. was a corporation organized and existing under the laws of the State of New York with offices at 175 Fulton Avenue, Hempstead, New York, and purported to engage in the business of selling stereo tape distributorships.
5. Commencing on or about April 1, 1972, and continuing thereafter until at least March 1, 1973, the exact dates being unknown to the grand jury, within the Eastern District of New York, the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON did knowingly and wilfully devise and intend to devise a scheme and artifice to defraud prospective stereo tape distributors and

to obtain money from these distributors by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be and were false and fraudulent when made, which scheme and artifice is set forth hereinafter.

(1)

6. It was part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did start a distributorship business under the name of Mackey Distributors, Inc., in which they would sell stereo tape distributorships to prospective distributors.

7. It was a further part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did cause advertisements, offering for sale stereo tape distributorships, to be placed in various newspapers through out the United States to attract potential distributors.

8. It was a further part of the scheme and artifice that the persons responding to the advertisements would be induced to purchase stereo tape distributorships, and would be told that the nature of the business was as follows:

(a) Each distributor would purchase cabinets, each containing 40 stereo tapes.

(b) The cabinets would be located in various stores and places of business by "professional locators" employed by Mackey Distributors, Inc.

(c) The minimum number of cabinets sold to a distributor would be ten, and the cost to the distributor for the ten cabinets containing a total of 400 tapes placed in ten locations would be approximately \$2,375.

(d) The merchants on behalf of the distributor would display the cabinets in their stores and sell the tapes to the general public.

(e) From time to time the distributor would restock

the cabinets with stereo tapes and collect from the merchants

where the cabinets were located proceeds from the sale of the tapes.

(f) Both the merchant and the distributor would make approximately one dollar on the sale of each tape.

9. It was a further part of the scheme and artifice that the distributors would be induced to make full payment for

the purchase of the distributorships in advance of receiving the cabinets, tapes and locations.

10. It was a further part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did make and cause to be made the following false and fraudulent pretenses, representations, and promises to the prospective distributors, well knowing that these pretenses, representations, and promises would be and were false and fraudulent when made:

(a) That Mackey Distributors, Inc., would furnish "major label" first quality tapes to the distributors;

(b) That skilled "professional locators" would locate the cabinets and stereo tapes in highly marketable locations.

(c) That the cabinets each containing 40 stereo tapes, would be provided in full and completely located within two to three weeks after payment in full was received.

(d) That the prospective distributors had a money back guarantee, in that after one year Mackey Distributors, Inc., would repurchase the distributorships if so requested by the distributors;

(e) That Mackey Distributors, Inc., would relocate cabinets where the location averaged less than five tape sales per week.

11. It was a further part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did cause literature to be prepared and furnished to prospective distributors, containing the false and fraudulent representation that Mackey Distributors, Inc., was a wholly owned

subsidiary of Jerome Mackey's Judo Incorporated, these defendants well knowing at the time that this representation would be and was false and fraudulent when made.

12. It was a further part of the scheme and artifice that the defendants RICHARD E. TAYLOR and WILLIAM NELSON would and did cause prospective distributors to be furnished with a list of

references of purportedly successful distributors of Mackey Distributors, Inc., and that the following false and fraudulent representations would be and were made to prospective distributors by two of the references, these defendants well knowing at the time that the representations would be and were false and fraudulent when made:

(a) That these two references were distributors of Mackey Distributors, Inc.;

(b) That their distributorships were successful.

13. It was a further part of the scheme and artifice that when distributors inquired as to why Mackey Distributors, Inc., had not performed the terms of the distributorship contract, the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did make and cause to be made false and fraudulent explanations to the distributors concerning their failure to perform in order to stall the distributors, well knowing at the time that the explanations would be and were false and fraudulent when made.

14. On or about each of the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the scheme and artifice and attempting to do so, the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON caused their advertising agent to place in post offices and authorized depositories for mail matter in Hempstead, New York, various envelopes containing advertisements to be sent and delivered by the United States Postal Service as hereinafter set forth in Counts One through Fifteen.

<u>COUNT</u>	<u>DATE OF MAILING</u>	<u>ADDRESSEE</u>
One	August 17, 1972	Minneapolis Star Tribune 427 Port Minneapolis, Minnesota 55415
Two	August 24, 1972	Boston Globe 135 Morrissey Blvd. Boston, Mass. 02107
Three	August 24, 1972	The Telegraph 62 Main Street Nashua, New Hampshire 03000

Four	September 9, 1972	The Utica Press 221 Oriskany Plaza Utica, New York 13508
Five	September 23, 1972	Times Independant Box 1121 490 First Avenue, S. St. Petersberg, Florida 33731
Six	September 24, 1972	Chicago Tribune 435 N. Michigan Avenue Chicago, Illinois 60611
Seven	September 25, 1972	Pittsburgh Press Box 566 Pittsburgh, Pa. 15230
Eight	October 1, 1972	Philadelphia Inquirer 400 N. Broad Street Philadelphia, Pa. 19101
Nine	October 8, 1972	Chicago Sun Times 401 N. Walbush Avenue Chicago, Ill. 60611
Ten	October 12, 1972	Houston Chronicle 801 Texas Avenue Houston, Texas
Eleven	October 15, 1972	Kansas City Times 1729 Grand Kansas City, Missouri
Twelve	October 15, 1972	Washington Post 1150 15th Street, N.W. Washington, D.C. 20071
Thirteen	October 16, 1972	Houston Post 4747 S.W. Freeberg Houston, Texas 77001
Fourteen	November 5, 1972	Baltimore News American Lombard & South Streets Baltimore, Maryland 25202
Fifteen	November 11, 1972	Journal Gazzette 600 W. Main Street Fort Wayne. Indiana 46802

In violation of Title 18, United States Code, Sections
1341 and 2.

COUNTS SIXTEEN THROUGH TWENTY-ONE

1. The Grand Jury incorporates by reference and realleges herein all of the allegations contained in paragraphs "1" through "13" of Counts One through Fifteen of this indictment.

2. On or about each of the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, the defendants JEROME MACKEY, RICHARD E. TAYLOR and WILLIAM NELSON did take and receive and cause to be taken and received from the United States mails various envelopes containing checks which had been delivered by the United States Postal Service to Mackey Distributors, Inc., 175 Fulton Avenue, Hempstead, New York from the following distributors-mailors:

<u>COUNT</u>	<u>DATE</u>	<u>DISTRIBUTOR-MAILOR</u>
Sixteen	September 14, 1972	Mr. Paul Suk
Seventeen	September 25, 1972	Mr. Fred Cole
Eighteen	September 28, 1972	Mrs. Thomas Connor
Nineteen	October 30, 1972	Mr. John Metzger
Twenty	November 8, 1972	Mr. Mort Flynn
Twenty-One	November 14, 1972	Mr. Dale Webb

In violation of Title 18, United States Code, Sections
1341 and 2.

A TRUE BILL

J. F. C.
FOREMAN.

David D. Franks
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

No. _____

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

CRIMINAL Division

THE UNITED STATES OF AMERICA

vs.

JEROME MACKEY, RICHARD E. TAYLOR
and WILLIAM NELSON, Defendants.

INDICTMENT

Title 18, United States Code,
Sections 1341 and 2

A true bill,

Foreman.

Filed in open court this day
of , A. D. 19

Clerk.

Bail, \$

GPO 902-482
HAROLD J. FRIEDMAN, AUSA
596-4228

THE CHARGE OF THE HONORABLE JACK B. WEINSTEIN

4 THE COURT: Ladies and gentlemen:

5 I am now going to tell you what the
6 law is. I want you to follow my instructions,
7 but you will decide the facts.

8 I have no view of the guilt or innocence
9 of these two defendants. My sole purpose and
10 desire is to see that they are fairly tried, and
11 nothing I have said or done should be used by
12 you in inferring any feeling that I may have
13 about the guilt or innocence. You will decide
14 the case solely on the evidence before you and
15 the law.

16 The fact that the prosecution was brought
17 in the name of the United States is of no
18 significance. The United States is entitled to
19 no more help or weight than any other litigant.
20 Everyone, the government and individuals, are
21 equal in this court. Nobody is entitled to
22 extra consideration and nobody is entitled to any
23 sympathy.

24 The indictment, as I have told you, is
25 an accusation in writing. It is not evidence

1
2 and it is entitled to no weight in your
3 deliberations.

4 Each defendant has pleaded not guilty.

5 The government has the burden of proving
6 guilt beyond a reasonable doubt with respect to
7 each element of each offense charged. This
8 burden never shifts and remains on the government
9 throughout the trial.

10 A defendant does not have to prove his
11 innocence, he need not submit any evidence at
12 all.

13 A defendant need not take the witness
14 stand and you may draw no inference unfavorable
15 to him because he does not testify. You may
16 not consider the fact that a defendant did not
17 testify.

18 A presumption of innocence remains with
19 a defendant throughout the trial and will be
20 considered by you in your deliberations.

21 A reasonable doubt means a doubt
22 sufficient to cause a prudent person to hesitate
23 to act in the most important affairs of his life.
24 A reasonable doubt may result from the evidence
25 produced or from failure to produce evidence.

Finding an individual to be guilty
of committing a felony and subjecting him to
the possibility of criminal penalties is most
serious and you will consider this fact in
determining whether you have a reasonable doubt.
Nevertheless, if at the end of the trial you
are convinced beyond a reasonable doubt that a
defendant is guilty of a crime as charged, then
you should find him guilty of that crime.

Mr. Mackey and Mr. Nelson are charged
with violating two provisions of the United
States Code, Section 1341 and Section 2 of
Title 18.

There are a number of dates in the
indictment, but the precise date need not be
proven, an approximation is sufficient. The
relevant portion of Section 1341, which is
known as the mail fraud statute, reads as
follows:

"Whoever, having devised or intending
to devise any scheme or artifice to defraud,
or for obtaining money or property by means
of false or fraudulent pretenses, representations,
or promises . . . for the purpose of executing

such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, "shall be guilty of an offense against the laws of the United States."

Now I will explain the meaning of this provision in some detail, but what you should note for the moment and bear in mind is the gist of the offense which is charged in the indictment is the willful misuse of the mails in carrying out or attempting to carry out a scheme to defraud as charged. The mails must have played a significant part in enabling the defendant to carry on a fraudulent scheme. Use of the mails must be an integral part of the mode of operations. The reason for that is if it isn't, then the prosecution doesn't

belong in the Federal Court, and that is why
it is here.

Section 2 of Title 18 of the United States Code reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

That is the aider and abettor provision of the law, and I will explain that to you in a moment. But you will note that Section 2 permits the guilt of a defendant to be established without proof that he personally did every act constituting the offense if he aided and abetted another in the commission of a crime and had the requisite criminal intent.

The indictment charges twenty distinct crimes or counts, and you must consider each count separately as to each defendant.

Richard Taylor is mentioned as a defendant in

1
2 the indictment, but as you already know he
3 is not on trial here.

4 The guilt or innocence of each separate
5 defendant must be considered separately by you.
6 You must not permit yourselves, in considering
7 the evidence, to treat the several defendants
8 on trial as a single entity or unit. You are
9 required to consider the guilt or innocence of
10 each of them as individuals and distinct from
11 one another and they are entitled to that
12 careful consideration. But of course if you
13 find that they have cooperated or worked together
14 in some way, you may take any such relationship
15 that they have into account.

16 The defendants are on trial only for the
17 acts or offenses charged in the indictment, and
18 you may not convict a defendant of any other act
19 or offense based on the evidence of other
20 uncharged acts or offenses; so if you think they
21 did something else wrong, it might or might not
22 be in your mind a crime, but that is not what
23 you are here for, you are just here to try the
24 crimes that are charged.

25 Now let me read you the indictment, it

1
2 is a rather long indictment, and what I have
3 done is I have had a Xeroxed copy made that
4 will help you in your consideration and you
5 will be able to take it in with you and you
6 will see each count, and then you will come
7 in and you will be asked:

8 As to Count One as to the defendant
9 Mackey, guilty or not guilty?

10 Then, As to the defendant Nelson,
11 guilty or not guilty?

12 Then you will be asked as to Count Two
13 and Count Three and all along the line, then
14 these other counts with respect to the mailing
15 back of checks, and you will be able to take
16 this in with you (indicating). I will give it
17 to the clerk and he will give it to you,
18 Madam Forelady, as soon as I tell you to
19 deliberate.

20 Incidentally, I have also had prepared
21 this defendant exhibit list which shows all the
22 defendants' exhibits, so if you want any exhibit
23 you can refer to it by letter in a note, or you
24 can ask for all of them, whichever you prefer.

25 Also the government's exhibit list, the

1 same, and the witnesses called by the govern-
2 ment in case you should want some of the
3 testimony read.

4 Try to be very precise, after all, we
5 don't want to re-read the whole record and
6 sit here a week while we re-read everything,
7 so unless you really need it don't ask for it
8 and then try to be precise.

9
10 Then the witnesses called by the
11 defendants.

12 So you will have all of these lists
13 with you.

14 The clerk will also supply you with
15 pencil and paper so you can work readily.

16 Now let me read you the whole indictment,
17 as I say, it is a long one.

18 First, Counts One through Fifteen --

19 Does counsel want me to read all the
20 indictment in view of the fact that I am going
21 to send it in?

22 MR. MC CARTHY: I don't feel it is
23 necessary.

24 MR. WOLF: I don't, either.

25 THE COURT: What do you think?

2 MR. FRIEDMAN: No, your Honor.

3 THE COURT: Let me just summarize it
4 for you.

5 It charges that Mr. Mackey was president
6 and Mr. Taylor was vice-president;

7 That Mr. Nelson was secretary-treasurer
8 of Mackey;

9 That this was a corporation organized
10 and that beginning around April 1972 until
11 about March of 1973 Mackey and Nelson knowingly
12 and willfully devised and intended to devise a
13 scheme to defraud prospective stereo tape
14 distributors and that as part of the scheme they
15 started this distributorship, Mackey Distributors,
16 Inc., and that they caused advertisements to be
17 placed in various newspapers and attempted to
18 induce people to purchase stereo tape distributor-
19 ships telling them that there would be professional
20 locators, and other aspects, including that they
21 would make approximately a dollar on each sale
22 of tape and that the cabinets would be restocked,
23 and the like;

24 That major label, first quality tapes
25 would be supplied, that skilled professional

1 locators would locate the cabinets, that they
2 would be provided these locations and the
3 tapes and the cabinets within two or three
4 weeks after payment in full;

5 And then there was the one year money-
6 back guarantee and that there would be provision
7 for relocations;

8 That literature was prepared indicating
9 that Mackey Distributors, Inc. was a wholly
10 owned subsidiary of Jerome Mackey Judo, Inc.;

11 That a list of references of purported
12 successful distributors were furnished knowing
13 that they were false;

14 And that various false statements were
15 made when the distributors asked why there had
16 been a failure to perform;

17 And that various advertisements were
18 placed in newspapers.

19 Those are Counts One through Fifteen,
20 but there is no Count Thirteen.

21 For example, Count One charges that on
22 or about August 17, 1972 there was mail from
23 Long Island to Minneapolis Star Tribune,
24 Minneapolis, Minnesota, an advertisement for
25

1
2 insertion there as a part of the scheme, and
3 then all of these others, and Fifteen is to
4 the Journal Gazette in Ft. Wayne, Indiana.

5 Now, Counts Sixteen through Twenty-one
6 re-allege everything in the first counts and
7 alleges that as a part of the scheme they
8 received various pieces of mail. For example,
9 Count Sixteen recites that on or about December
10 14th a check from Paul Suk, and so on, and it
11 is from different people as charged, and you
12 will see that.

13 Now the government, in order to prove
14 guilt under the mail fraud statute, must prove
15 three essential elements beyond a reasonable
16 doubt:

17 First: The act or acts of having devised
18 and having intended to devise a scheme or
19 artifice to defraud certain distributor-
20 customers out of money or credit by means of
21 false or fraudulent representations concerning
22 the product and the services to be provided by
23 Mackey Distributors, Inc., the financial state
24 of Mackey Distributors, and the reason for the
25 company's failure to perform contracts as

1 charged in the indictment.

3 The first thing is that they entered
4 into a fraudulent scheme.

5 The second, the act or acts of placing,
6 or causing to be placed, in an authorized
7 depository for mail, envelopes containing
8 advertisements intended to be sent or delivered
9 by the United States Postal Service, as charged
10 in Counts One through Fifteen of the Indictment,
11 no Thirteen, and the act or acts of taking and
12 receiving or causing to be taken and receive
13 from the United States mails, and those are the
14 checks in the remaining counts that they received
15 allegedly.

16 Third: The act or acts of so using the
17 United States mails willfully, and with the
18 specific intent to carry out some essential step
19 in the execution of said scheme or artifice to
20 defraud, as charged.

21 Now, in order to convict of any of the
22 crimes charged, you must find that the defendant
23 was a knowing participant in the alleged
24 fraudulent scheme at the time of the mailing.
25 If he became aware of the fraud after the mailing

1
2 and joined the scheme after that mailing, he
3 cannot be convicted of the prior mailing, but
4 he could be convicted of any subsequent mailing.

5 You see that.

6 The use of the mails must have been
7 necessary to effectively carry out the scheme.
8 In addition, a defendant would have to have
9 knowledge that the use of the mails would follow
10 in the ordinary course of business or reasonably
11 have foreseen that there would be the use of the
12 mails. A defendant would have to know or have
13 reason to believe the same, for example, that
14 the advertising agency would use the mails to
15 place advertisements in newspapers in various
16 parts of the country. Similarly, he would have
17 to know or have reasonably foreseen that the
18 salesmen or customers would mail the checks from
19 various parts of the country to the headquarters
20 on Long Island.

21 The word "scheme" and "artifice," as used
22 in the statute, include any plan or course of
23 action intended to deceive others, and to obtain,
24 by force or fraudulent pretenses, representations,
25 or promises, money from persons so deceived.

A statement or representation is
false or fraudulent within the meaning of the
statute, if known to be untrue, and made or
caused to be made with the intent to deceive.

You may ask yourself, for example, did
defendants offer major label tapes, top-tune
tapes intending not to supply them? I think
that is fairly evident. We all, I think, know
what fraud is in this general sense.

A statement is false if it was untrue
when made, and was then known to be untrue by
the person making it or causing it to be made.

A "false or fraudulent representation"
may be made by statements of half-truth or the
concealment of material facts or by innuendo
as well as by affirmative statements or acts.

The use of the United States mails in
furtherance of the scheme to defraud is an
essential element of the offense charged. It
is not necessary that the defendant do any
actual mailing. It is sufficient if the mails
were in fact used to carry out the scheme, and
if the use of the mails by a participant or
somebody else was reasonably foreseeable or was

known and to be occurring in the usual and regular course of that scheme, necessarily. The use of the mail must bear a substantial relationship to the scheme. Under the statute the sending or receiving of mail must be for the purpose of executing the scheme. Thus you must find that the mailings played a significant part in enabling the defendants to obtain money fraudulently, that is if you decide, of course, that they did obtain money that way.

Incidentally, it is not necessary that a defendant actually himself receive money if he is a part of the scheme, if he is, if he wants to benefit himself or another, that is sufficient.

In order for the defendants to be guilty of Counts One through Fifteen, it is necessary that the elements in the case establish beyond a reasonable doubt that the envelopes containing the advertisements were willfully mailed, or caused to be mailed by the accused, with the intent to help carry out some essential step in the execution of the scheme to defraud alleged in the indictment. Similarly, for

1
2 Count Sixteen through Twenty-one, it must
3 be established that the defendants received
4 or caused to be received the checks that are set
5 forth in those counts with the intent that
6 the fraudulent scheme alleged in the indictment
7 would be carried out.

8 And that is willful and intentional if
9 it is done deliberately, and voluntarily, with
10 the specific intent to accomplish something the
11 law forbids - - that is to say, with the bad
12 purpose to disobey or disregard the law.

13 To act with "intent to defraud" means
14 to act knowingly and with the specific intent
15 to deceive, ordinarily for the purpose of either
16 causing some financial loss to another, or
17 bringing about some financial gain to oneself
18 or some financial gain to another - - and I say
19 you don't have to actually gain anything from
20 the scheme in order to be guilty.

21 An act is not knowing if it is committed
22 because of inadvertence, carelessness, negligence,
23 stupidity, or some other non-criminal reason.

24 You should acquit the defendants if
25 you are not satisfied beyond a reasonable doubt

1
2 that they knew of the fraudulent activities
3 of others in the company and permitted these
4 activities to continue when they should have
5 stopped them and had full power to stop them,
6 or that they themselves engaged in such
7 activities.

8 One may not willfully and intentionally
9 remain ignorant of a fact important and
10 material to his conduct in order to escape the
11 consequences of the criminal law.

12 The defendants could not deliberately
13 close their eyes to what was going on around
14 them in order to permit them to contend that
15 they were deceived by their associates.

16 The state of mind of a defendant must
17 be inferred from the circumstances as revealed
18 by the evidence and on the basis of your
19 common sense and general experience.

20 Under the mail fraud statute, each
21 separate use of the mails in furtherance of
22 the scheme to defraud constitutes a separate
23 offense.

24 Now there is a point with respect to
25 what we call venue or the place at which a

1
2 person is accused, and let me say a word
3 about that:

4 175 Fulton Street, in Hempstead - -
5 remember, that was the main offices of Mackey
6 Distributors, Inc. - - is within the Eastern
7 District of New York, that is the district
8 where we sit, and 501 Fifth Avenue and any
9 other addresses in the County of New York are
10 in the Southern District. That is not this
11 district, it is the Southern District of New
12 York, it is a different court, Federal Court.
13 You may not convict a defendant of any offense
14 which took place wholly outside the Eastern
15 District of New York, but an offense begun in
16 one district and completed in another or
17 completed in more than one district may be
18 prosecuted in any district in which such
19 offense was begun or continued or completed. So
20 if it is a substantial part of what was done
21 here, even though a part of it was done elsewhere,
22 then this is the preferred court to try this case.

23 As I told you, Mr. Mackey and Mr. Nelson
24 have also been charged under Section 2 of Title 18.
25 This section permits a defendant to be found

2 guilty if you find that he aided and abetted
3 the violation of the mail fraud statute.

4 In order to find aiding or abetting,
5 it is necessary to find that a defendant will-
6 fully and knowingly associated himself in some
7 way with the criminal venture charged and that
8 he willfully participated in it as he would
9 something he wished to bring about.

10 If you want to find out whether a
11 defendant aided or abetted, you must ask your-
12 self such questions as:

13 Did he willfully and knowingly associate
14 himself with a criminal venture which used
15 the mails as a part of a scheme to defraud the
16 distributor-customers of Mackey Distributors?

17 Did he participate in it as something
18 he wished to bring about?

19 Did he seek by his actions to make it
20 succeed?

21 If he did, then he is an aider and
22 abettor and he would be guilty.

23 Whoever aids, abets, counsels, commands,
24 induces or procures the commission of a crime
25 is punishable in the same way as a principal.

1
2 There was evidence in this case of
3 good character. Evidence of a defendant's
4 good character is in the same category as
5 other factual evidence. This must be considered
6 by the jury in its deliberations and may, of
7 itself if believed, create a reasonable doubt
8 where otherwise no such doubt would exist, but
9 you should consider it obviously in connection
10 with all of the other evidence in the case.

11 A critical factual issue, in addition
12 to the mailing issue, is whether a defendant
13 knew that there would be no deliveries of tapes,
14 cabinets and locations as promised, and that
15 then they deliberately continued to take new
16 orders knowing that the new customers would pay
17 their money and not get what they paid for.

18 It is not a crime to fail in business;
19 it is not a crime to be a business man and to be
20 overly optimistic or even to be stupid as a
21 business man. Whether fraud or good faith
22 failure was involved is for you to decide.

23 Now so much for the law.

24 Let me say a few words about the credi-
25 bility of witnesses. You are the sole judges of

the credibility of the witnesses and the weight that their testimony deserves. The assumption that a witness will speak the truth may be dispelled by the appearance and conduct of the witness, by the manner in which the witness testifies, by the character of the testimony given, or by contrary evidence.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified and other matter in evidence which either indicate confirmation or contradiction or indicates that the witness is or is not worthy of belief.

Consider each witness' motive, his intelligence or her intelligence, and state of mind, partisanship in the prosecution or defense of the case, the relationship the witness bears to each side and the extent to which there has been support or contradiction. Also, the fact that a witness, and there was one witness formerly a defendant, Mr. Taylor, has been convicted of a crime may be considered by you as evidence of lack of morality which makes it more likely that he will lie on the witness stand.

1
2 Testimony of someone like Fisher or
3 Taylor needs to be carefully scrutinized by
4 you because they testified they were co-
5 conspirators in effect. In the first place,
6 the fact that a witness committed a crime of
7 fraud shows a defect in his character that
8 may have made him more likely to lie on the
9 witness stand. In the second place, he can
10 be punished for his own offense so that he
11 may try to court the prosecutor's favor and
12 avoid some degree of punishment himself by
13 testifying in return for some advantage he
14 expects to receive.

15 If you believe that a witness has will-
16 fully sworn falsely before you with respect to
17 a material fact, you may disregard his or her
18 testimony completely. But, a witness may be
19 mistaken in part and accurate in part, and you
20 have to decide that.

21 Each of you is entitled to your own
22 opinion, but you should carefully and respect-
23 fully, as I am sure you will, listen to each
24 other, and you should not hesitate to change
25 your opinion if you believe somebody else is

1
2 correct.

3 Remember, your decision must be your
4 own.

5 Any verdict must be unanimous.

6 Your oath sums up your duty, and that
7 is without fear or favor to any person, you
8 will well and truly try the issues before these
9 parties according to the evidence given to you
10 in court and according to the laws of the
11 United States.

12 Now I will see you gentlemen at side
13 bar, of course, but is there any reason why I
14 should not now excuse the alternates?

15 MR. FRIEDMAN: No, your Honor.

16 MR. WOLF: No, your Honor.

17 THE COURT: The four alternates are
18 excused.

19 I don't want you to discuss this case
20 with each other or with anybody else until
21 after the verdict is in.

22 Is that clear?

23 Thank you very much.

24 THE CLERK: Tomorrow morning 10:00 o'clock.

25 (At this point the four alternates

1
2 left the courtroom.)

3 THE COURT: All right, gentlemen,
4 may I see you at side bar?

5 (The following occurred at side
6 bar without the hearing of the jury.)

7 MR. MC CARTHY: Judge, I respectfully
8 except to your Honor's addition to Page 5
9 of your Honor's charge, and that is with
10 respect to separate verdicts, it was a comment
11 that you made that the jury consider the
12 cooperation with each other, and I believe
13 that might be misleading in that it might
14 imply guilt by association.

15 THE COURT: Yes.

16 (Judge Weinstein then addressed the
17 jury as follows):

18 THE COURT: There is no guilt by
19 association, you understand that, merely
20 because people may be related or in business
21 together doesn't mean that they are guilty,
22 that is if one is guilty the other is guilty.
23 I didn't mean to imply that at all.

24 Each person has to be considered
25 separately as to each count.

1
2 What I indicated to you is that
3 you can consider all of the evidence,
4 including a relationship, if you think it
5 bears on guilt or innocence.

6 (The side bar conference then
7 continued.)

8 THE COURT: All right.

9 MR. MC CARTHY: Also, your Honor, with
10 respect to the conviction of a crime, as I
11 recall, well, perhaps Mr. Wolf - -

12 MR. WOLF: Mr. Fisher was convicted of
13 a crime.

14 MR. FRIEDMAN: Absolutely not.

15 MR. WOLF: A State crime.

16 MR. FRIEDMAN: It was not a felony.

17 (At this point Judge Weinstein
18 addressed the jury.)

19 THE COURT: I am told that Mr. Fisher
20 admitted that he had been convicted of a
21 crime. I don't recall it myself, but your
22 recollection will govern.

23 (The side bar conference then
24 continued.)

25 THE COURT: Anything further?

1 MR. MC CARTHY: No, your Honor.

2 THE COURT: Anything from you?

3 MR. FRIEDMAN: No, your Honor.

4 MR. WOLF: No, your Honor.

5 THE COURT: All right.

6 (The trial then proceeded within

7 the hearing of the jury.)

8 THE COURT: Will you swear the marshals,

9 please?

10 (At 5:50 p.m. the marshals were sworn.)

11 THE COURT: All right.

12 Marshal, will you give the Forelady,

13 please, those documents I referred to?

14 All right, ladies and gentlemen:

15 Retire and consider your verdict.

16 (The jury then left the courtroom to

17 begin its deliberations.)

18 THE COURT: All right, call the next

19 case, please.

20 Gentlemen, I want you to lay the

21 exhibits all out on the side so in case they

22 call for them we can get them to them.

23 (The jury continued its deliberations.)

24 (At 6:50 p.m. the following occurred.)

1
2 THE COURT: May I see the note, please?

3 MR. FRIEDMAN: Your Honor, one of the
4 government's exhibits was not in evidence.

5 THE COURT: Which one was that?

6 MR. FRIEDMAN: That would be 39-A, that
7 would be the massive advertisement that Mr.
8 Nelson testified he made, there was a stipulation
9 and only one was put into evidence which was a
10 representative sample because of the voir dire
11 by Mr. Wolf.

12 THE COURT: What is 39, is it on the list?

13 MR. FRIEDMAN: It was on the list as
14 having been in evidence and they ask for it.

15 THE COURT: 39-A is not in evidence.

16 MR. FRIEDMAN: Yes, sir, it is not.

17 THE COURT: I will write in, "Not in
18 evidence, stipulated."

19 Is that all right?

20 MR. MC CARTHY: Yes, your Honor.

21 MR. WOLF: Those ads were not stipulated
22 to, I think you should say they are not in
23 evidence, we stipulated to the testimony.

24 THE COURT: I will say, "subject of
25 stipulation."

1 All right?

2
3 MR. FRIEDMAN: There was a government
4 stipulation, I believe, your Honor.

5 THE COURT: Excuse me?

6 MR. WOLF: That they mailed all the ads.

7 THE COURT: Do you want me to say,
8 "Not in evidence" - -

9 MR. WOLF: "Not in evidence."

10 THE COURT: "Subject to stipulation."

11 MR. WOLF: "Subject of stipulation."

12 THE COURT: "Subject of stipulation."

13 All right.

14 Hand me the documents.

15 MR. MC CARTHY: These are the government's
16 exhibits (indicating), those are the defendants'.

17 THE COURT: 20, 20-A, 20-B, 22, 22-B,
18 25-B, 26, 26-A, B, C;

19 And 27-A, 27-C, 28-A, 28-B, 29;

20 And 29-A, 29-C, 30, 30-A, 31,-31-A,-----

21 34, 34-A, 35, 35-A, 36, 36-A, 36-B;

22 37, 37-A, 39-A1, 31 and 43.

23 Defendants' Exhibits E, N, P and W.

24 I am handing all of these exhibits
25 plus the Court's Exhibit 18, which is the note

1
2 with my notation on it - - would you like
3 to examine it, gentlemen?

4 MR. WOLF: No, thank you.

5 THE COURT: I am handing them to the
6 marshal.

7 Please give these to the jury.

8 Thank you.

9 (The jury continued its deliberations.)

10 (At 8:30 p.m. the following occurred
11 in the courtroom without the presence of the
12 jury:)

13 THE COURT: Bring in the jury, but
14 before you do that I am going to tell you I am
15 going to let the jury go home unless there is
16 objection.

17 Is there any?

18 MR. MC CARTHY: No objection.

19 MR. WOLF: No, sir.

20 MR. FRIEDMAN: When would the jury
21 resume deliberations tomorrow?

22 THE COURT: Well, I will try to bring
23 them in at 9:00 o'clock. Probably of course
24 we will have to let them go at 2:00 because
25 we have a Sabbath observer, we cannot bring

them in on Saturday and Monday is a holiday.

I don't know what to do about it, I
would be perfectly happy to come in on Monday
myself.

MR. FRIEDMAN: I'm sorry?

THE COURT: I say I would be perfectly willing to come in on Monday myself, I would be perfectly happy to come in on Monday.

Now will you mark this, they want to
know whether the first fifteen individual
counts have to be made individually or collectively.

MR. FRIEDMAN: I would say that each one has to be made separately.

Now, your Honor, since the jury went out I believe at about 6:10 - -

THE COURT: No, it was 5:45.

MR. FRIEDMAN: 5:45, I am sorry, well,
I would suggest that we wait until 9:00 o'clock.

THE COURT: Well, it is an exhausting day, you know.

MR. FRIEDMAN: Yes, we all that try a case before you have long hours and it is very exhausting.

THE COURT: That is not the point, it is

1
2 very difficult for a jury to sit through as
3 they did so many hours, they have been working
4 fairly steadily since 10 o'clock.

5 What do the defendants say?

6 MR. MC CARTHY: Well, I think, your
7 Honor, as your Honor indicated they might be
8 tired, and if so they should be permitted to
9 leave.

10 THE COURT: Bring them in and I will
11 tell them if they want to bring in a partial
12 verdict they may do so, but I will see what
13 they want.

14 (At 8:35 p.m. the jury took its place
15 in the jury box.)

16 THE COURT: Ladies and gentlemen:
17 I know you have had a very long day
18 and really this is a very difficult and
19 exhausting process.

20 You are free to bring in a verdict
21 against any of the defendants as to any of
22 the counts. Each count has to be handled
23 separately, as I told you, and you have to say
24 as to Count One, Mr. Mackey, guilty or not
25 guilty, Mr. Nelson, guilty or not guilty.

1
2 But you can bring in a partial verdict as
3 against any of the defendants and against any
4 of the counts, if you wish.

5 I would suggest that you break for the
6 evening and we bring you back tomorrow, unless
7 you would like to continue, whichever you would
8 prefer.

9 You look a little tired.

10 JUROR NUMBER 10: Yes, we are.

11 THE COURT: Is that all right?

12 We will break tonight at 8:30 and you
13 will be here tomorrow at 9:00 o'clock.

14 Come right to the jury room, don't
15 begin to deliberate until you are all here.

16 We will have to break about 2:00 o'clock
17 tomorrow, so bear that in mind.

18 Good night and have a pleasant evening.
19 Do any of you need any help from the
20 marshals to go to the station?

21 JUROR NUMBER 7: Yes, your Honor,
22 Long Island Railroad.

23 JUROR NUMBER 5: I am going part of
24 the way.

25 THE COURT: If you want the marshal to

1624

2 accompany you to the station, we will do that.

3 You are all now going to leave.

4 All right, I will see you tomorrow
5 morning at 9:00 o'clock.

6 (At this point the jury left the
7 courtroom for the evening.)

8 MR. FRIEDMAN: Your Honor, as to Court's
9 Exhibit 19, the jury note marked Exhibit 19,
10 the question again, may we have that, please?

11 Well - -

12 Your Honor, that can be responded to
13 in the morning.

14 THE COURT: I've already told them that.

15 MR. FRIEDMAN: All right.

16 THE COURT: Good night, thank you
17 very much.

18 MR. FRIEDMAN: Good night, your Honor.

19 MR. WOLF: Good night.

20 MR. MC CARTHY: Thank you, your Honor.

21 (The court session was then closed.)

★ ★ ★

EXHIBITS

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1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

1626
FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT ED. N.Y.

★ DEC 5 1975 ★

4 -----x
5 UNITED STATES OF AMERICA, TIME A.M.
6 : P.M.

7 Plaintiff, :

8 -against- :

9 JEROME MACKEY and : 75 CR 468
10 WILLIAM NELSON,

11 Defendants. :

12
13 United States Courthouse
14 Brooklyn, New York

15 October 10, 1975
16 10:30 o'clock a.m.

17
18 B e f o r e :

19 HONORABLE JACK B. WEINSTEIN, U.S.D.J.

20 and a Jury.

21
22 I hereby certify that the foregoing is a
23 true and accurate transcription of my stenographic notes of this proceeding.
24
25 EMANUEL KARR
OFFICIAL COURT REPORTER
U. S. District Court
Reportor
Court
U. S. District Court

1627

1 Appearances:

2 DAVID G. TRAGER, ESQ.
3 United States Attorney
for the Eastern District of New York4 BY: HAROLD FRIEDMAN, ESQ.
5 Assistant United States Attorney6
7 MARVIN WOLF, ESQ.
Attorney for Defendant Mackey8 DAVID MC CARTHY, ESQ.
9 Attorney for Defendant Nelson10
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1 THE CLERK: United States of America against
2 Jerome Mackey and William Nelson.

3 THE COURT: Have you read Court Exhibit 21,
4 the note asking for the testimony of Donald Anderson's
5 conversations with Mr. Nelson?

6 MR. FRIEDMAN: Yes, your Honor.

7 THE COURT: Have you picked out the pages you
8 want read?

9 MR. FRIEDMAN: Yes, we have, your Honor.

10 THE COURT: Have you marked them?

11 MR. FRIEDMAN: No, we have not. We have
12 agreed it will be pages 1064 through 1096.

13 THE COURT: Mark the first line and the last
14 line and give it to the reporter, please.

15 Before the jury is brought in why do you have
16 to start at page 1064? They just want the conversa-
17 tion. Begin on 1067 at line 14 or rather line 10 --
18 line 8 I guess.

19 MR. FRIEDMAN: I have no objection to starting
20 there.

21 MR. MC CARTHY: No objection, your Honor.

22 THE COURT: And then stop at 1072 line 22.

23 MR. FRIEDMAN: It starts again at 1074 line 19.

24 MR. MC CARTHY: On page 1074 I suggest and I
25 submit it should start on line 22.

1 THE COURT: Well, you need those few introduc-
2 tory remarks and you will end at line 25 page 1074
3 and then you will start at 1079 line 9 and end at
4 1080 line 8.

5 MR. FRIEDMAN: 1085 line 5 through line 9.

6 THE COURT: No, that does not relate to
7 conversations.

8 MR. FRIEDMAN: All right.

9 THE COURT: Then start at 1086 line 7 to
10 line 19 page 1087. You will omit the colloquy at
11 1087 line 3 to 9 and stop at line 19. Then read
12 page 1088 line 17.

13 MR. FRIEDMAN: I am sorry, on 1087 we are
14 doing the entire page except lines 3 through 8?

15 THE COURT: You will go on page 1087 to
16 line 19 and begin again on 1088 line 16, 1089 line 9
17 and then you will begin the cross-examination on
18 line 14 on 1089 to line 19 on page 1089. Begin on
19 1092 line 2 through 1092 line 21, 109 line 18.

20 MR. FRIEDMAN: On 1092 we are starting at
21 what line?

22 THE COURT: 18, 1095 line 24 and that is it.

23 Next time, gentlemen, if a note comes out asking for
24 conversations specifically please do this yourself
25 so I do not have to do it. Is that satisfactory to

1 defendants and the Government?

2 MR. WOLF: Yes, your Honor.

3 MR. MC CARTHY: Yes, your Honor. There is
4 something on page 1080, your Honor, as mentioned a
5 conversation from line page 1079 line 8 to 1080
6 line 7. I would ask the question and answer to
7 page 1080 is not in conversation. Apparently the
8 conversation was with the son or daughter which is
9 not conversation with Mr. Nelson.

10 THE COURT: He says he talked to Ne'son on
11 five or six occasions on line 4.

12 MR. MC CARTHY: I would consent to that.

13 THE COURT: Just that, all right, just up to
14 line 4 and nothing more. I have marked my copy and
15 it would be helpful if counsel would do this in the
16 future.

17 MR. MC CARTHY: I thought they meant the
18 ent' e testimony.

19 THE COURT: They have been very specific.
20 They followed my instruction not to ask to have
21 things unnecessarily read. Bring in the jury, please.

22 (THe jury took its place in the jury box.)

23 THE COURT: Good morning, ladies and gentle-
24 men. We have selected what we think you want. If
25 at any point you should feel you have heard enough

1 let me know and we will stop reading. Is that clear?

2 Proceed, please.

3 (Mr. Karr then read the testimony as
4 indicated. The reading ended at page 1071 line 15.)

5 (The jury left the courtroom.)

6 THE COURT: I am going to send in a form for
7 sandwiches for the jury so they will have their
8 lunch inside because they will be leaving at
9 2:00 o'clock as you know. You might give some
10 consideration about what you want to do about Monday.
11 It is a holiday. I have no objection to coming in
12 but we do not have any court personnel.

13 MR. MC CARTHY: Might we perhaps consider that
14 and give your Honor an answer say at 1:00 o'clock?

15 THE COURT: Yes, there is no rush about it.

16 (Whereupon the jury continued its delibera-
17 tions in the jury room.)

18 * * *

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1 1

2 (At 2:30 o'clock p.m. on October 10,
3 1975 the following occurred in the above-
4 entitled case:)

5 THE CLERK: Juror's note is marked
6 Court Exhibit 22.

7 || (So marked.)

8 THE COURT: Well, we have to let the
9 jury go. Bring in the jury.

10 MR. FRIEDMAN: When is the jury coming
11 back, I would ask that they come back on
12 Monday.

THE COURT: What is your position?

14 MR. MC CARTHY: Pardon?

15 THE COURT: What is your position?

16 MR. MC CARTHY: Your Honor, I would ask
17 that they be brought back on Tuesday, I think
18 that since it is a holiday on Monday they may
19 be pressured into making a decision earlier.

20 MR. WOLF: I will go along with whatever
21 the Court wishes.

22 THE COURT: You abstain?

23 Being in the jury.

24 MR. FRIEDMAN: What is the answer, your
25 Honor?

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1 2

2 THE COURT: I will cast the deciding
3 vote.

4 (The jury then took its place in the
5 jury box.)

6 THE COURT: Ladies and gentlemen, we
7 have to break now because one of the jurors
8 has a problem with time.

9 We will have to be back here on 9:30
10 on Tuesday since Monday is a holiday.

11 9:30 Tuesday.

12 Is that clear to all of you?

13 MEMBERS OF THE JURY: Yes.

14 THE COURT: I want you all to take care
15 of yourselves because if any of you don't come
16 back we will have to do this all over again.

17 Good afternoon, have a pleasant weekend.

18 Don't discuss the case.

19 Do you have a car ready to take the
20 juror?

21 THE MARSHAL: Yes, sir.

22 THE COURT: Thank you.

23 Good afternoon.

24 (The jury was then permitted to leave
25 and to return on Tuesday morning, October 14, 1975.)

Bourt

~~#424~~
~~#636~~
1634

2 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

-against- 75-CR-468

7 JEROME MACKEY and
WILLIAM NELSON,

Defendants.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

DEC 5 1975

TIME A.M. P.M.
10
11 United States Courthouse
Brooklyn, New York

13 ||| October 14, 1975
10:00 o'clock A.M.

15 Before:

16 HONORABLE JACK B. WEINSTEIN, U.S.D.J.

21 MICHAEL PICOZZI
22 OFFICIAL COURT REPORTER
23 I hereby certify that the foregoing is a true and accurate transcription of my notes taken during the proceedings in this cause.

~~Official Court Reporter
U. S. District Court~~

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1 Appearances:
2

3 DAVID G. TRAGER, ESQ.
4 United States Attorney
5 for the Eastern District of New York

6 BY: HAROLD FRIEDMAN, ESQ.
7 Assistant U.S. Attorney

8 MARVIN WOLF, ESQ.
9 Attorney for Defendant Mackey

10 DAVID MC CARTHY, ESQ.
11 Attorney for Defendant Nelson

1

2 THE COURT: Have you decided on what you want
3 done?

4 MR. FRIEDMAN: Is there a second note?

5 THE COURT: Yes.

6 MR. FRIEDMAN: To refresh the Court's memory as
7 to what took place on Friday, the jury asked for all
8 of the Anderson testimony. I would ask that we comply
9 with that request.

10 THE COURT: Is that all right?

11 MR. MC CARTHY: Judge, I have no objection except
12 it seems to me we can ask the jury whether they want
13 the conversation or the entire testimony. They said
14 they want the testimony of Anderson with the meetings
15 of Mr. Nelson.

16 THE COURT: He did meet with Nelson. I would
17 think that is all there is.

18 MR. FRIEDMAN: I think that would be difficult to
19 do, the testimony is not that long and --

20 MR. MC CARTHY: The total testimony is thirty-
21 five pages. I have picked out what I thought they
22 requested. The testimony of the meeting of --

23 MR. FRIEDMAN: There were several meetings.

24 MR. MC CARTHY: Two meetings. There was another
25 conversation. A meeting on August 31, September 11,

1
2 and a conversation of September 8th. I would object
3 to the conversation on September 8th because it is not
4 consistent with the second note which says meetings, not
5 conversations.

6 THE COURT: That is a meeting in a generic sense.

7 MR. FRIEDMAN: In view of the jury not being
8 deprived of the entire thing I ask that the entire
9 testimony of Mr. Anderson be read.

10 THE COURT: I am going to take the latest note.
11 They know what they want.

12 MR. MC CARTHY: There are approximately ten pages
13 of mine. I attempted to include --

14 THE COURT: Just get together and mark it off the
15 way you did the last time. Bend down the beginning
16 page and put an arrow where the Reporter is to begin and
17 bend over the page where it ends and put an arrow where
18 it ends.

19 Can't you agree?

20 MR. FRIEDMAN: In all fairness, the entire testimony
21 of Mr. Anderson should be given to the jury.

22 THE COURT: I don't agree. Why don't you do it
23 the way they ask? If they need anything I will give it
24 to them.

25 (Recess taken.)

1 THE COURT: How long will this take?

2 MR. FRIEDMAN: Ten minutes at the most, your
3 Honor.

4 MR. MC CARTHY: Would your Honor like us to mark
5 your Honor's copy?

6 THE COURT: Yes.

7 (Recess taken.)

8 THE COURT: Have you agreed?

9 MR. FRIEDMAN: We agreed on portions and just
10 need another portion.

11 THE COURT: What is the problem?

12 MR. FRIEDMAN: Your Honor, I believe that --

13 MR. MC CARTHY: Judge, the problem boils down to
14 two things: Mr. Friedman would like testimony pertain-
15 ing to the hotel and I objected to that. There was
16 another question with respect to the September 8th
17 conversation, it's not a meeting and I object to that.
18 The final conversation is subsequent to the signing of
19 the contract --

20 THE COURT: With Nelson?

21 MR. MC CARTHY: Yes.

22 THE COURT: All of that goes in. All three
23 instances I rule in favor of the Government.

24 MR. MC CARTHY: I would note respectfully with
25 respect to the third section the conversations with

1 Nelson after the signing of the contract, that by that
2 very fact it is no longer a relevant meeting and the
3 note if construed as the meetings referring to past
4 contract conversations -- but if it is construed the
5 other way I ask that the entire testimony be read.

6 THE COURT: All the testimony?

7 MR. MC CARTHY: Yes. If your Honor construes
8 that conversation after September 11th to be in, I
9 ask that the entire testimony be read.

10 THE COURT: We will do that. Start at 1154,
11 line 19 and go to --

12 MR. MC CARTHY: 1189, line 11.

13 MR. FRIEDMAN: We have an agreement as to
14 three things that should be left out.

15 THE COURT: What?

16 MR. FRIEDMAN: 1162 lines 2 through 7.

17 THE COURT: 2 to 7?

18 MR. FRIEDMAN: Page 1174, line 19 through
19 page 1175, line 4.

20 THE COURT: 1175 --

21 MR. FRIEDMAN: Line 4. On page 1175 line 11
22 through 13.

23 THE COURT: 1175? 11?

24 MR. FRIEDMAN: Through 13. And 1176, line 8.

25 Anything else?

1 MR. MC CARTHY: That is it.

2 THE COURT: Mark this. They're asking for

3 Government's Exhibit 15E and F.

4 THE CLERK: Previous note marked Court Exhibit 23

5 and this note is Court Exhibit 24.

6 MR. FRIEDMAN: When the jury comes out would you
7 indicate these headphones have nothing to do with the
8 case?

9 THE COURT: Yes.

10 15E and F is being given to the marshal. Will
11 you give them to the jury and then ask the jury to come
12 out, please?

13 THE MARSHAL: Yes, your Honor.

14 (The jury is in the jury box.)

15 THE COURT: Good morning, everybody. These
16 headsets have nothing to do with you. They are in
17 another case.

18 We will try to read what we think you want.
19 If at about any point you decide you have heard enough,
20 we will stop.

21 You may commence reading.

22 (Whereupon, the Reporter commenced reading the
23 testimony of the witness Anderson.)

24 THE FOREMAN: Yes, your Honor.

25 THE COURT: Thank you very much.

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(The jury left the courtroom.)

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3 THE COURT: All right. The jury indicated they

4 had heard enough.

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(Recess taken.)

6

7 (continued next page)

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IGsf

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1 THE COURT: Where are the counsel in the
2 Mackey case? We don't have a note, I am just trying
3 to arrange the schedule for the rest of the day.

4 Bring in the jury, please.

5 MR. FRIEDMAN: Is there a note, your Honor?

6 THE COURT: No, this is just to make arrangements
7 for the rest of the day.

8 (Mackey jur_i is in the jury box.)

9 THE COURT: Has lunch arrived yet?

10 JUROR NO. 1: Yes, your Honor.

11 THE COURT: You will begin your lunch. We
12 have a problem when we end today.

13 How soon do you have to be home?

14 JUROR NO. 7: 2:00 or 2:30.

15 THE COURT: What time is sunset?

16 JUROR NO. 7: Well, I have not had time to do
17 anything. The actual candlelighting is about 7:10
18 but I have a lot to do before then. I haven't been
19 able to do anything this week.

20 THE COURT: Well, I will let you take the 3:10
21 to Lawrence. Do you have your car here?

22 JUROR NO. 7: No. I have to be getting home
23 before 4:00.

24 THE COURT: You will be home at 3:55. I will
25 have a marshal drive you to the Long Island Railroad

1 2 so you can take your train to Lawrence.

3 JUROR NO. 7: Certain places where I have to
4 pick things up, close early today, and I have to have
5 things in the house. If I could take the subway at
6 2:00 o'clock.

7 THE COURT: No, I want you here until 2:30.

8 JUROR NO. 7: All right. He'll drive me to
9 Atlantic Avenue.

10 THE COURT: Yes. After I discharge the jury at
11 2:30, he or she will drive you to the Atlantic Avenue
12 station.

13 You can go out, continue your deliberations and
14 your meal and I will see you all at 2:30.

15 (Jury excused for further deliberation at
16 12:45 p.m.)

17 THE COURT: Anything further? Enjoy your lunch.
18 I will see you all back here at 2:30 unless before.

19 (Continued on next page.)

1 THE CLERK: Two jury notes marked as Court
/MP:ib

2 Exhibits 25 and 26.

3 THE COURT: Government's Exhibit 17-A, B, 18,
4 30-B and C, 35-B and C, and 41-B.

5 MR. McCARTHY: The second note just came in,
6 your Honor.

7 THE COURT: I am handing to the Marshal 17-A,
8 B, and 18. Would you give that to the jury, please.

9 Where are those documents?

10 MR. FRIEDMAN: One other document the Inspector
11 went upstairs to get.

12 THE COURT: Let me have what you have.

13 30-C, 30-B, 35-B, 35-C are being given to the
14 Marshal. Would you give those to the jury, please?

15 THE MARSHAL: Yes, sir.

16 MR. FRIEDMAN: 41-B, your Honor.

17 THE COURT: Will you give this to the jury,
18 please.

19 THE MARSHAL: Yes.

20 (Recess taken at this time, 2:25 p.m.)

21

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2 (On Tuesday, October 14, 1975, at

3 3:50 p.m. the following occurred in open court.)

4 THE COURT: All right.

5 May I see you in the Mackey case, please?

6 You can leave your things there, gentlemen.

7 I am going into the Mackey case.

8 The note --, "Could we have a legal
9 definition of a wholly owned subsidiary?"

10 Well, it can be defined in a variety of
11 ways, I think the easiest way would be to give
12 them the Webster Third International edition
13 definition that a subsidiary corporation is one
14 in which another corporation owns at least a
15 majority of the shares and thus has control.

16 That is essentially the definition of Webster's
17 Third New International Dictionary.

18 MR. FRIEDMAN: It is also cited in Words
19 and Phrases.

20 THE COURT: A wholly owned subsidiary is
21 where all the stock is owned.

22 MR. WOLF: Judge, I respectfully submit
23 to your Honor that this should have been an
24 element of proof that the government should have
25 submitted in their prima facie case, and I would

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1 2

2 respectfully submit that there are a number
3 of interpretations - -

4 THE COURT: What would you like me to
5 say?

6 MR. WOLF: Well, frankly, I don't think
7 it is appropriate for your Honor to say any-
8 thing to the jury in connection with that
9 definition at this time.

10 THE COURT: Well, I think it is common
11 usage that is involved now and since we haven't
12 had any expert on it and it was used in a way
13 that was designed to be understood by laymen,
14 these were the words used by salesmen to
15 prospective distributors, and the lay meaning
16 applies, not any technical meaning.

17 MR. WOLF: I think there should have
18 been at least expert testimony or a request
19 for judicial notice to have been taken during
20 the prima facie part of the case because there
21 is also an Internal Revenue part which deals
22 with being permitted to file a consolidated
23 financial statement.

24 THE COURT: It has nothing to do with it,
25 we are talking about common usage and Webster's

3

2 Third International Dictionary seems to me
3 to have an appropriate definition..

4 If you have some other definition, I
5 will be glad to get it from you.

6 MR. FRIEDMAN: I would also say that
7 Ballantine's also substantiates that definition.

8 THE COURT: Well, really, I am not
9 interested in Ballantine's because I don't think
10 any prospective buyer would know about
11 Ballantine's, but if the defendants want to give
12 some other definition, let me have it.

13 MR. WOLF: If I may, is the Court doing
14 this under the judicial notice provision?

15 I assume there has to be some provision
16 under which the Court is giving this information
17 to the jury.

18 THE COURT: No, no, I would think it is
19 the general right of the jury to ask for the
20 meaning of words, judicial notice is one method
21 of it, but every jury is assumed to know the
22 meaning of language, and if they need assistance
23 in determining the meaning of the language, I
24 can give it to them.

25 If you want me to read some other

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1 2 definition, I will be happy to do so.

3 4 MR. MC CARTHY: Judge, the only thing
4 5 that I would do is I would join with Mr. Wolf,
5 6 but if it does have a common usage then I
6 7 would respectfully submit that what we should
7 8 do, and I will ask your Honor to do it, is to
8 9 say to them that a wholly owned subsidiary
9 10 has a common every day meaning, and not refer
10 11 to any definition or dictionary definition.

11 12 THE COURT: In short you have no
12 13 language you want to suggest?

13 14 MR. MC CARTHY: That is correct.

14 15 THE COURT: Do you want to suggest any
15 16 on the part of Mr. Mackey?

16 17 MR. WOLF: Well, I would respectfully
17 18 say that I will object and I also would like
18 19 to call the Court's attention to the fact that
19 20 if your Honor is going to do it over my objection
20 21 and give an instruction to the jury then that
21 22 you tell them that in a criminal case the Court
22 23 shall instruct the jury or rather that it may
23 24 instruct the jury but is not required, the jury
24 25 is not required to accept the definition as
 conclusive as any fact which is judicially

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1 noticed.
2

3 THE COURT: I will be happy to do that
4 under the Federal rules, but do you have any
5 specific definition you want?

6 MR. WOLF: The one that your Honor
7 spoke of, that a majority controls - -

8 MR. FRIEDMAN: That isn't what his
9 Honor used, a wholly owned subsidiary is where
10 all the stock is owned by the parent company.

11 MR. WOLF: I respectfully submit that
12 under the basic nature of the case here, because
13 the financial statement that was submitted, that
14 is the Jerome Mackey financial statement, that
15 was a consolidated statement and it relates to
16 that, and I submit that it would have been a
17 completely different case and the proof would
18 have been completely different in connection
19 with what was meant by that.

20 THE COURT: So you have no definition?
21
22

23 (Continued on next page.)
24
25

1
2 THE COURT: You have no definition
3 you want to give me?

4 MR. WOLF: I would -- yes, if I may?

5 THE COURT: Yes. I would like to have it.

6 MR. FRIEDMAN: Your Honor, I think that
7 wholly owned subsidiary --

8 MR. MC CARTHY: Wait.

9 MR. FRIEDMAN: Sorry.

10 MR. WOLF: Section 1504 of the Internal
11 Revenue Code.

12 THE COURT: May I have it, please?

13 MR. WOLF: I don't have it with me.

14 I didn't know this was going to come up today.

15 That deals with --

16 THE COURT: Yes.

17 MR. WOLF: -- affiliated, consolidated --

18 MR. FRIEDMAN: Your Honor, while that
19 Section is being brought to the courtroom, I
20 wanted to indicate that the relevance of the
21 wholly owned subsidiary would be in the context
22 of the state of mind of the distributors.

23 THE COURT: Yes, I understand.

24 MR. FRIEDMAN: And there was testimony
25 by the distributors that they were of the

1
2 opinion that it was a wholly -- that the
3 company was wholly owned and backed by Judo.

4 THE COURT: I understand that.

5 What is Mr. Nelson's position? Does
6 he want me to read from the Internal Revenue
7 Code?

8 MR. MC CART' Y: I would join in that
9 application, Judge, but I still --

10 THE COURT: Yes.

11 MR. MC CART' Y: Yes, I join, but I
12 would stress my initial objection.

13 THE COURT: Mr. Wolf, perhaps you can
14 assist my secretary. Go into chambers. You
15 will find it there.

16 MR. WOLF: May I be excused to do that?

17 THE COURT: Yes. Go right into my
18 chambers. You will find the U.S. Code. You
19 will find it quicker than she.

20 Y u say 1504 of Title 26?

21 MR. WOLF: Yes, sir, 1504 of the Internal
22 Revenue Code.

23 THE COURT: I do not see any definition
24 of wholly owned subsidiary.

25 MR. WOLF: That deals with the stock

1 if the - -

2
3 THE COURT: Show me. Mark off
4 what you want me to read.

5 MR. WOLF: Excuse me.

6 THE COURT: I don't think it has
7 any bearing on what we are talking about.
8 Take a pencil and mark off what you want
9 me to read.

10 MR. WOLF: Deals with - -

11 THE COURT: Excuse me. Just take a
12 pencil and mark it off.

13 MR. WOLF: All of 1504(a).

14 THE COURT: The whole of 1504(a)?

15 MR. WOLF: Yes, sir.

16 THE COURT: Title 26?

17 MR. WOLF: Yes, sir.

18 THE COURT: All right.

19 Bring in the jury.

20 MR. FRIEDMAN: Before the jury is
21 brought in, may I ask what your Honor is
22 doing with respect to that section?

23 THE COURT: I will read it to them.

24 MR. FRIEDMAN: I would respectfully
25 submit that that section is misleading. It's

1 not in point.

2
3 We're talking about English language,
4 wholly owned subsidiary. That's talking
5 about affiliated groups and 80%.

6 It makes a mockery out of the word
7 "wholly."

8 I submit if that's read to the jury,
9 that would only attempt to further confuse
10 them, and your Honor is well aware of what
11 your function is here, and that's to clarify
12 their question, and I don't think - -

13 THE COURT: Do you object?

14 MR. FRIEDMAN: I strenuously object,
15 your Honor.

16 THE COURT: All right. Then I am not
17 going to read it, if you object, because
18 1504(a) is sheer gibberish, so far as this
19 jury or any other jury is concerned. It does
20 not use the word "subsidiary" corporation.

21 MR. WOLF: It - - I respectfully submit
22 that it does, in connection with this particular
23 situation, when Mr. Mackey - -

24 THE COURT: I do not see the word
25 "subsidiary" corporation.

1
2 MR. WOLF: Where 80% or more is
3 owned by a parent of a subsidiary corporation,
4 they're entitled to file a consolidated report.

5 THE COURT: It does not define what a
6 subsidiary corporation is.

7 MR. WOLF: There are subsequent
8 definitions that define what a subsidiary is.

9 THE COURT: Where?

10 MR. WOLF: I'm sorry. I wasn't prepared
11 on this point for your Honor. I didn't know it
12 was going to come up at this point.

13 MR. FRIEDMAN: The Government didn't,
14 your Honor, know until the note came out either.

15 I would submit, your Honor, that the
16 legal definition -- the legal definition is
17 almost not relevant. What is --

18 MR. WOLF: I think it's clear here where
19 it says that includable corporations connecting
20 through stock ownership with a common parent
21 corporation which is an includable corporation
22 if stock possessing at least 80% of the voting
23 power of all classes of the stock.

24 The simple test in dealing with SEC
25 parties, which Mr. Mackey's company and their

1
2 financial statement was drawn, is if a
3 corporation owns 80% of the stock, they can
4 include that.

5 THE COURT: No.

6 MR. WOLF: In their financial statement.

7 THE COURT: There is no definition of
8 a subsidiary corporation in that provision you
9 brought to my attention.

10 Bring in the jury, please.

11 MR. WOLF: I respectfully except to
12 your Honor's giving any definition at all at
13 this point. This is a question to be determined
14 by the jury.

15 THE COURT: Thank you.

16 (Jury present.)

17 THE COURT: Ladies and gentlemen, I have
18 your note saying "Could we have a legal
19 definition of wholly owned subsidiary."

20 I am not going to give you any legal
21 definition of wholly owned subsidiary because
22 the language here was used in its ordinary
23 sense and you have to decide what was meant by
24 the people that said it and what was understood
25 by the people who heard it and what ordinary

2 people would be expected to understand under
3 those circumstances, just as the word car or
4 tape or corporation or anything else. It is
5 just an English word.

If you want me to, I will be happy to
read you from the Webster's Third International
Dictionary, to refresh your recollection on
what Webster's thinks the average person means
when he uses the term. Would you like me to
do that?

12 JUROR NO. 5: Yes.

13 THE COURT: All the jurors unanimously
14 indicate they would.

15 "A subsidiary company is a company
16 wholly controlled by another. It owns more
17 than one-half of its voting stock."

What a wholly owned subsidiary means
is something you will have to deduce yourself.

I also would like to point out to you
that on this matter you are not required to
accept as conclusive this definition; but you
are to use your own experience and knowledge
of the English language.

25 Is that clear?

1
2 There is a very complicated definition
3 in the Tax Law, for tax purposes. Do you want
4 me to read you that?

5 JUROR NO. 8: Yes.

6 THE COURT: You would like me to read
7 you that? All right. I will read it.

8 Let me have the book.

.9 Is there any objection from the
10 defendants to my reading that?

11 MR. WOLF: No, Judge.

12 MR. MC CARTHY: No, your Honor.

13 MR. WOLF: This is the book up here.

14 May I be permitted?

15 THE COURT: Yes.

16 MR. WOLF: Thank you.

17 THE COURT: You can do as you wish,
18 of course, ladies and gentlemen, but my own
19 impression is that the language should be
20 considered in the context of what ordinary
21 lay people would consider, not what is in
22 that tax provision.

23 However, if you would like, I will
24 read it to you, since there is no objection
25 by the defendants.

Section 1504 of Title 26 of United

States Code defines:

"(a), A definition of affiliated group as used in this chapter, the term affiliated group means one or more chains of includable corporations, connected through stock ownership with a common parent corporation which is an includable corporation if, one, stock possessing at least 80% of the voting power of all classes of stock and at least 80% of each class of the non-voting stock of each of the including corporations, except the common parent corporation is owned directly by one or more of the other includable corporations; and, two, the common parent corporation owns directly stock possessing at least 80% of the voting power of all classes of stock and at least 80% of each class of the non-voting stock of at least one of the other includable corporations.

23 " As used in this subsection, the term
24 stock does not include non-voting stock which
25 is limited and preferred as to dividends."

1
2 Is there any other assistance you
3 would like?

4 The jurors all shake their head no.

5 Is there anything further that counsel
6 would like me to do at this time?

7 MR. MC CARTHY: No, your Honor.

8 THE COURT: Retire and consider your
9 verdict.

10 (The following occurred in the absence
11 of the jury.)

12 MR. FRIEDMAN: Your Honor, how late will
13 you be keeping the jury today?

14 THE COURT: I do not know. I think I
15 am going to keep them around quite some time,
16 unless defendants and counsel for the Govern-
17 ment feel that I should not.

18 If you have any views on the matter,
19 bring them to my attention before the Reporter,
20 or otherwise I will assume that you agree with
21 me that they ought to remain.

22 MR. WOLF: Yes, Judge. Thank you.

23 MR. FRIEDMAN: Yes, your Honor.

24 THE COURT: All right.

25 (Recess taken.)

1
2 THE COURT: Gentlemen, I asked the
3 marshals to bring in the usual sandwich
4 forms and they informed me there is a
5 revolution in the ranks, they don't want
6 sandwiches, they want hot food and they are
7 willing to pay for it. I don't know what
8 to do. I don't know to take two hours which
9 is what hot food takes. On the other hand,
10 I don't want to let them go at 6:30 after
11 such a long weekend.

12 What is your feeling?

13 MR. WOLF: I have no objection. If
14 they want to go home and come back and
15 deliberate tomorrow, I have no objection.

16 MR. MC CARTHY: I would have to agree.
17 I understand some of the jurors have quite a
18 distance.

19 MR. FRIEDMAN: I would give the jury
20 the alternative, going out for hot food and
21 coming back and deliberating or another hour
22 and then going home.

23 THE COURT: Bring in the jury.

24 THE MARSHAL: You won't believe this,
25 your Honor. There is a verdict.

RECEIVED
U. S. ATTORNEY

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EAST. DIST. N.Y.

Peter J. Garamone